A

PP

v.

TAY CHUNG CHAW & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
SOFIAN ABD RAZAK J
[CRIMINAL TRIAL NO: 45-19-2009]
27 MAY 2012

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Mens rea possession - Whether proved - Whether presumption under s. 37(da)(xvi) of the Dangerous Drugs Act 1952 applied - Whether knowledge inferred from attempt to escape arrest - Whether drugs for personal consumption - Prima facie case - Whether*
D *established - Dangerous Drugs Act 1952, ss. 37(da)(xvi)*

CRIMINAL PROCEDURE: *Defence - Evidence - Trafficking in dangerous drugs - Failure to tender defence case during prosecution case - Whether fatal to defence - Whether absence of evidence negated connection of accused to drugs - Whether possession proved by cogent evidence*

E

The accused, SD1 and SD2, were charged for an offence of trafficking, to wit 895g of methamphetamine, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39B(2) of the same. Insp. Muhammad Iqbal bin Mohd Isa
F ('SP4') was assigned to apprehend two men, one Chinese and the other, an Iranian. Based on information regarding a trafficking transaction, SP4 led a team to Midvalley, Megamall. During the surveillance which took place at the Adidas shop, an Iranian man who was carrying a paper bag was seen meeting with a Chinese
G man. Upon handing over of the brown paper bag ('exh. P8') by the Iranian man to the Chinese man, they were approached by SP4 who identified himself as the police officer. The Iranian man immediately ran and hid himself in the storeroom of a shop whilst the Chinese man was arrested. In the brown paper bag, SP4
H found a white plastic bag containing two transparent packets with whitish substance, subsequently confirmed to be 895g of methamphetamine. The Iranian man was arrested by SP5. The Chinese man was confirmed to be the first accused ('SD1') whilst the Iranian man, the second accused ('SD2'). At the end of the
I prosecution case, the court found that the first and second accused had custody, control and possession of the brown paper bag and the drugs contained therein and both equally had the

knowledge of the drugs. There was also no break in the chain of evidence. In the circumstances, the court found that the prosecution had succeeded in proving a *prima facie* case and called upon the first and second accused to enter their defence. In his defence, SD1 contended that he went to Midvalley Megamall to change money from a moneychanger when he was approached by two foreigners. He further stated that before the arrest, one of the foreigners threw the brown paper bag near where SD1 was standing and ran away. SD2's case was that he had followed one Peyman Bahrom Soleyman Pour, an Iranian, to Midvalley to meet one of SD2's friends and while he was window shopping, he was arrested by the police. He contended that he was not carrying anything but it was Peyman who was carrying the brown paper bag.

Held (convicting and sentencing both accused to death by hanging):

(1) SD1 and SD2 had only denied the version presented by the prosecution witnesses, SP4 and SP5 whereby the version given by both SD1 and SD2 was diametrically opposite to that given by SP4 and SP5. Positive finding of actual possession of the proscribed drugs was made after having analysed the evidence of the prosecution and that of the defence. The prosecution had successfully established possession pursuant to s. 37(da)(xvi) of the DDA. Further, the cumulative force of the facts adduced by the prosecution clearly showed that both the accused had *mens rea* possession and hence were presumed to be traffickers of the drugs. (para 68)

(2) The evidence of knowledge could easily be drawn from the inferences of their attempt to escape arrest. Their overt act in doing so clearly demonstrated the proof of knowledge by inferences. Evidence of conduct is admissible under s. 8 of the Evidence Act 1950. The conduct of SD2 in attempting to escape arrest was because there was evidence to show that the drugs in exh. P8 were in their physical custody and control. *DPP v. Brooks* (refd). (paras 72, 75 & 78-79)

(3) The court also found that both the accused had carried the proscribed drugs and the quantity of the drugs seized were far in excess of that they would require for their personal use, if any. The strong irresistible inference was that the drugs were conveyed and transported for the purpose of trafficking it in as defined under s. 2 of the DDA. (para 80)

(4) It is trite law that failure to put across the defence case during the prosecution case could be fatal to the defence. Hence, the failure by the defence to put its version of the case to the key prosecution witnesses *ie*, SP4 and SP5, that the brown paper bag exhibit belonged to Peyman, had dampened the defence case and was fatal. *PP v. Lin Lian Chen* (foll); *Alcontra Ambross Anthony v. PP* (foll). (paras 84 & 86)

(5) The defence version that Peyman was at the scene of the crime when SD1 and SD2 were arrested was rejected as there was evidence that showed that Peyman was elsewhere at the material time. Peyman was arrested at the traffic light junction near Bangsar Shopping Centre at 5.05pm whereas both the accused were arrested at Midvalley Megamall at 3.50pm. Thus, it was highly improbable for Peyman to be at two different places at the same time. (para 90)

(6) A fact in issue may be proven by more means than one. Therefore, it did not necessarily follow that the absence of fingerprints or DNA profiling on the nail clippings of the accused persons meant that they were not connected with the drugs in question. There were other cogent evidence to prove that SD1 and SD2 were in physical possession of the drugs. (para 91)

(7) The court, having subjected the prosecution and defence evidence to maximum evaluation, was satisfied that the prosecution had proven its case against the accused persons beyond reasonable doubt. Both accused were held to be in physical possession, custody and control of the brown paper bag and its contents and also had the knowledge. There was no break in the chain of exhibits seized and tendered in court. (para 94)

Case(s) referred to:
Affis Ariffin v. PP [2011] 7 CLJ 927 CA ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(foll)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Balamurugan Raja Gopal v. PP [2011] 9 CLJ 477 CA ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(refd)***
Mamasobri Useng v. PP [2010] 8 CLJ 949 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 ***(foll)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
Pavone v. PP (No 2) [1985] 1 LNS 99 HC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(foll)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(foll)***
PP v. Ling Tee Huah [1980] 1 LNS 212 AC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(foll)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Wan Yurillhami Wan Yaacob & Anor v. PP [2010] 1 CLJ 17 ***(refd)***
Yusri Pialmi v. PP [2010] 6 CLJ 878 FC ***(dist)***

Legislation referred to:
Criminal Procedure Code, ss. 180(1),182A(1)
Dangerous Drug Act 1952, ss. 2, 37(d), (da)(xvi), 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 8, 9, 94, 114(g)
Panel Code, s. 34

For the appellant - Gooi Soon Seng (Mak Kah Keong with him); M/s Gooi & Azura
For the respondent - Mohd Hafiz Mohd Yusoff; DPP

Reported by S Barathi

JUDGMENT

Sofian Abd Razak J:

[1] The charge against both the accused is as follows namely:

> Bahawa kamu bersama-sama pada 19 Oktober 2009 jam 3.50 petang, di Ground Floor Utara, berhadapan kedai pakaian sukan jenama Adidas, (Lot G-025 dan G-027) Mid–Valley Megamall, di dalam Daerah Brickfields, di dalam Wilayah Persekutuan Kuala

A Lumpur, di dalam meneruskan niat bersama, telah mengedar dadah berbahaya iaitu 895g methamphetamine. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah s. 39B(2) Akta yang sama dibaca bersama s. 34 Kanun Keseksaan.

B **[2]** At the close of the prosecution's case, six witnesses were called and their evidence as narrated are as follows:

Factual Matrix Of The Case

C **[3]** On 19 October 2009, SP4 (Insp. Muhammad Iqbal bin Mohd Isa), assigned to the operation section JSJN, Bukit Aman, was involved in an operation at the Midvalley, Megamall to apprehend two men one Chinese and the other, an Iranian. At about 10am while SP4 was in his office, he received an D information regarding one trafficking transaction that would be taking place in front of the Adidas shop at the Midvalley, Megamall. At about 12 noon, SP4 held a briefing attended by D/Sjn Mustafa. D/Kpl Mohd Ali, D/Kpl Mohd Azhar, Kons Mohd Khair, Konst. Mohd Riduan and Kons. Mohd Zulfikri and at E 2pm SP4 and his team proceeded to Midvalley Megamall. Upon arrival at the Midvalley at about 3pm, SP4 divided his men into two teams in view of the fact that there are two ways of going to the Adidas shop. The 1st team was observing and doing surveillance at the Adidas shop near the escalator and the 2nd F team was on surveillance at the entrance to the Midvalley, Megamall. After about 20-30 minutes at about approximately 3.30pm in the afternoon, SP4 was informed by D/Kpl Mohd Ali (SP5) that a man believed to be an Iranian with a well built body, carrying a paper bag entering the Midvalley Megamall. SP4 then G instructed D/Kpl Mohd Ali and his team to trail the Iranian man. At the material time the 1st team was already on surveillance in front of the Adidas shop. Throughout the said surveillance and observation, the 1st team saw the Iranian man meeting with a Chinese man who was wearing a red shirt standing in front of a H shop selling 'Girls' branded items. The Chinese man was earlier seen coming up from the basement floor on an escalator. SP4 saw the Iranian man talking to the Chinese. On seeing the handing over had taken place in that the brown paper bag with the word 'Louis Vuitton' written on it, was handed by the Iranian man to I the Chinese using the right hand. SP4 then approached the two men and identified himself as a police officer by showing his police

authority card. As soon as SP4 introduced himself as a police officer, the Iranian man immediately ran and hid himself in the storeroom of a shop named 'Royal Sporting House'. At the same time as the Iranian man fled the scene, the Chinese man was arrested who was later identified by SP4 as the 1st accused sitting in the dock. SP4 instructed SP5 to go after the Iranian man. The 1st accused was arrested and later brought to the emergency exit towards the toilet for a search to be done. During a search on the 1st accused, SP4 found a bunch of keys in the pocket and that a search in the brown paper bag exh. P8, SP4 found a white plastic bag with word written on it 'Win One Million US Dollars'. In the said white plastic bag, SP4 found two transparent packets containing whitish powdery substance suspected to be syabu. SP4 identified 1st accused as the Chinese man whom he had arrested when the 2nd accused handed over the brown paper bag exh. P8 containing the drugs exhs. P10 and P11 respectively.

[4] SP4 was later informed by D/Kpl Mohd Ali that the Iranian suspect was arrested who was identified as the 2nd accused in the store of the Royal Sporting House and had sustained minor injuries. A search on the 2nd accused could not find anything incriminating except that an Iranian passport in the name of Habib Shayan Saadi was found. SP4 and SP5 identified the 2nd accused sitting in the dock as the Iranian who had fled the scene upon being approached by SP4 when he introduced himself as a police officer and who handed over the brown paper bag exh. P8 to the 1st accused. SP4 then read the caution to both the accused, in Bahasa Malaysia to the 1st accused and in English to the 2nd accused in a language easily understood by both of them. A search on the 1st accused and 2nd accused found nothing incriminating except those items listed in the search list marked as P16.

[5] Both the accused were brought to the Brickfields Police Station and later were taken to the IPK, KL. The 2nd accused was handed over to ASP Zainal to conduct a house check and the 1st accused was brought to his house also for purposes of search SP4 then handed over the exhibits to the investigating officer, SP6 (Inspector Kahar bin Killi) at about 4 am in the morning 20 October 2009. When SP4 handed over the exhibits seized from the accused to SP6, he prepared the 'Akuan Serah Menyerah' and marked as exh. P17. SP4 could identify exh. P8

the brown paper bag, exh. P9 the white plastic bag found in exh. P8, while exh. P10 and exh. P11 respectively were the transparent plastic bags found in exh. P9. SP4 could identify the respective exhibits because he had also made marking 'A', signature and date 19 October 2009 on exh. P8. On exh. P9, SP4 put a marking 'A1', signature, and date 19 October 2009. On exh. P10, SP4 put a marking 'A2', signature and date 19 October 2009. On exh. P11, SP4 put a marking 'A3', signature, and date 19 October 2009. All the markings on all the exhibits were in blue marker pen. The gross weight of the two transparent plastic bag was 1,570g.

[6] During the cross-examination of SP4, the earlier part of the cross was devoted to asking the witness whether the weighing machine which the witness used to weigh the drugs was calibrated or not?. To which SP4 replied that the digital weighing machine he had used was in good working condition but was not quite sure whether it had been calibrated. SP4 said that the gross weight of 1570g was for plastic packets marked 'A3' and 'A4' respectively.

[7] SP2 (Suhana binti Ismail) a chemist from the Chemistry Department, Petaling Jaya who conducted the analysis on the drugs testified that on 23 October 2009 SP6, the investigating officer met her to hand over a box marked 'K' with the PDRM seal 425. SP2 then registered the exhibit received and gave a receipt with the laboratory number PJ (FOR) 10928/09-0 to SP6. SP2 then weighed the 1st packet in the box marked 'K' containing a crystalline substance and noted the gross weight was 639.77g and the net weight minus the plastic wrapper was 629.46g. SP2 then proceeded to weigh the 2nd packet from the box marked 'K' and noted that the gross weight was 630.28g and the net weight minus the plastic wrapper was 619.91g. She conducted the colour, GCMS and the GCFID test on the drugs which was confirmed to be methamphetamine weighing 895g, a dangerous drug as listed in the 1st schedule of the Dangerous Drugs Act 1952. She then prepared a chemist report marked as exh. P7.

Submission At The Close Of Prosecution Case

The Defence Submission

[8] The learned counsel submitted on the following issues:

That the onus is on the prosecution to ensure that adequate evidence was led to show an unbroken chain of evidence in respect of the exhibits. According to SP4, after the arrest on 19 October 2009 at about 4pm in the afternoon, both accused were taken to the IPD Brickfields and subsequently to IPK Kuala Lumpur. After that, OKT2 was handed over to ASP Zainal for the purpose of conducting a search in OKT2's house. SP4 was also instructed to fetch OKT1 back to his house and to conduct a search. SP4 testified that he handed over OKT1 and OKT2 together with the exhibits to SP6 on 20 October 2009 at about 4am in the morning. No evidence was led as to who has continuous custody of the exhibits from the Midvalley Megamall to IPD Brickfields and thereafter to IPK Kuala Lumpur and eventually to the accused's house or from both the accused houses and back to IPK KL. No evidence was led as to where the drugs were kept for a period of 12 hours before they were handed over to SP6. No evidence as to the safe keeping of the exhibits and the steps taken to ensure that the exhibits were not tampered with. Therefore the movement of the exhibits from the time they were seized until the time it was handed over by SP4 to SP6 was not explained by the prosecution witnesses.

[9] The failure by the prosecution to explain the said infirmities left the court in a state of doubt as regards the movement and the safe keeping of the exhibits. It is not permissible for the court to presume that the exhibits were well packed, sealed and kept in IPK KL by SP4. Therefore it was submitted that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. Where there is a doubt as to the identity of the exhibits, a failure to adduce evidence to provide the necessary link in the chain of evidence is fatal to the prosecution's case. Reference was made to the case of *Pavone v. PP (No 2)* [1985] 1 LNS 99 HC.

The Markings Of The Exhibits

[10] The learned counsel further submit that SP4 had handed over two exhibits marked A3 and A4 respectively but exh. P17 shows that SP4 had handed over two exhibits marked A3 and A4

respectively to SP6. In cross-examination, SP4 confirmed that the gross weight in A3 and A4 was 1570g. The existence of A4 was not only evidenced in the search list exh. P17 which was made soon after the arrest but was also confirmed by SP4 in his oral testimony during cross-examination. Thus the existence of the plastic bag marked as A4 containing drugs has created a further doubt on the identity of the exhibits seized by SP4. It is submitted that the attempt by the prosecution witnesses to explain the error in exh. P17 tantamount to an afterthought and contradicts the provision of s. 94 of the Evidence Act.

The Difference In Gross Weight Of The Drugs

[11] The gross weight of the drugs obtained by SP4 as stated in P17 was different with the gross weight obtained by SP2. Exhibit P17 shows the gross weight in A3 and A4 was 1570g whereas the gross weight obtained by SP2 from A2 and A3 was 1270.05g. The difference in gross weight is 299.95g. According to SP4, he ensured that the gross scale was set at '0' when he did the weighing and that the weighing was in good working order. The short fall of 299.95g of the exhibits when it reaches the hand of the chemist was not explained by the prosecution. The learned counsel then cited the case of *Yusri Pialmi v. PP* [2010] 6 CLJ 878 FC.

The Non-production Of CCTV Recording That Was Consistent To The Innocence Of The Accused Attract An Adverse Inference

[12] That the police failed to tender the CCTV recordings to enable the court to come to a reasonable conclusion. It was further submitted that the failure the CCTV recordings which can be produced but not produced could prove the innocence of both the accused.

No Evidence Of Custody, Control And Knowledge

[13] Although SP4 and SP5 testified that they saw the purported handing over of exh. P8, they did not testify how exh. P8 was seized. There was no evidence as to where exh. P8 was seized from. Both SP4 and SP5 denied that exh. P8 was seized from the floor but they did not testify that exh. P8 was seized from the hands of the 1st accused. On the contrary there was evidence

that nothing incriminating was found from 2nd accused body. There were no fingerprints or DNA profile of either accused were found on exhs. P8, P9, P10 or P11 respectively. The best evidence and the most independent evidence are the CCTV recordings which were not produced.

Whether The Evidence Irresistibly Points Towards The Guilt Of The Both Accused Persons Where The Evidence Is Based On Circumstantial Evidence?

[14] The evidence against both accused persons was purely circumstantial. The burden of proof on the prosecution in any case base on circumstantial evidence is a heavy one. The prosecution must prove that there is one and only conclusion irresistibly pointing towards the accused and no one else.

[15] The learned counsel submit that the prosecution had failed to prove a *prima facie* case against the both the accused and urge the court to acquit and discharge both the accused without calling them to enter their defence.

Submission In Reply By The Prosecution

[16] The learned deputy in his rebuttal submission on the issues raised by the defence has stated as follows namely:

[17] In order to prove the charge of trafficking under s. 39B of DDA 1952, the prosecution has to prove the following elements namely:

(a) that both accused had custody, control and possession coupled with *mens rea* knowledge of the drugs;

(b) that the drugs seized is a dangerous drug namely Methamphetamine with a net weight of 895g;

(c) that both accused trafficked in the said drugs.

[18] On the 1st element, the prosecution evidence is as follows namely on 19 October 2009 at about 2pm in the afternoon, SP4 with a police team went to the Midvalley Megamall, Kuala Lumpur. The police team was divided into two teams with a team led by SP4 conducted a surveillance at a Adidas shop near an escalator. The other police team was ordered to do surveillance at the entrance to the Midvalley Megamall which was led by SP5.

[19] After making the said surveillance at about 3.30pm in the afternoon, at about 3.50pm, SP5 who was positioned at the entrance to the Midvalley Megamall saw the 2nd accused walked towards the entrance to the Midvalley, Megamall holding a brown paper bag exh. P8 and walked towards the escalator and met with the 1st accused. At that point in time, SP5 had followed the 2nd accused from a distance of 15 to 20 meters away.

[20] At the same time SP4 saw the 1st and the 2nd accused talking to each other and the 2nd accused was seen handing over the exh. P8 to the 1st accused. SP4 immediately introduced himself as a police officer to both accused by showing his authority card. As soon as SP4 did that, the 2nd accused 'took to his heels' and ran towards one of the stores named 'Royal Sporting House' and SP5 was ordered to chase and arrest the 2nd accused. In the meanwhile, SP4 had arrested the 1st accused at the place where both accused met.

[21] After SP4 had arrested the 1st accused, SP4 had brought him to the rear section near the emergency exit to where the toilet was for purposes of conducting an inspection on the 1st accused. An inspection was carried out on the 1st accused and the exhibits found were as listed in the search list exh. P16 and an inspection inside the brown paper bag exh. P8 revealed that there was a white plastic bag with the words 'Win One Million US Dollars' marked as exh. P9. Inside exh. P9 were two transparent plastic packets the content were whitish powdery substance suspected to be drugs syabu.

[22] In regard to the 2nd accused, he was chased by SP5 and hid inside the storeroom of the Royal Sporting House where a scuffled took place before he was finally overpowered by SP5 and arrested. The 2nd accused was brought to where the 1st accused was arrested by SP4 and a search on the 2nd accused did not find any incriminating exhibits except an Iranian passport.

[23] Both the accused and the exhibits were taken to the IPD Brickfields for further action where SP4 did the markings on the exhibits seized namely as follows:

(a) on exh. P8, which is the brown paper bag 'Louis Vuitton' was marked 'A', signature and dated 19 October 2009;

(b) on exh. P9, which is a white plastic bag with the words written 'Win One Million US Dollars' was marked as 'A1', signature and dated 19 October 2009;

(c) on exh. P10, which is a white transparent plastic packet marked as 'A2', signature and dated 19 October 2009;

(d) on exh. P11 a transparent plastic packet marked as 'A3', signature and dated 19 October 2009.

[24] SP4 then handed over all the exhs. to SP6 on 20 October 2009 at about 4am in the morning together with an acknowledgement receipt marked as exh. P17.

[25] The prosecution further submit that both the accused have physical *mens rea* possession of the drugs based on direct evidence that the 2nd accused was seen carrying the brown paper bag exh. P8 containing the drug and handing it over to the 1st accused from whom SP4 had seized the drug. Based on the evidence of SP5 who did the surveillance on the 2nd accused who was carrying exh. P8 and handing it over to the 1st accused shows that both the accused have physical *mens rea* possession of the drugs contained therein. From the evidence thus far, it clearly shows that both the accused not only had the physical possession of the brown paper bag exh. P8 but it also shows that both the accused had knowledge of the contents in exh. P8 to contain drug by reference to the overt act of the 2nd accused fleeing the scene and hiding himself in the storeroom of the Royal Sporting House and a scuffled ensued prior to the arrest between the 2nd accused and SP5, the circumstances of the brown paper bag exhibit, the two transparent plastic packets which contained the whitish powdery substance and also the weight of the drugs of 1570g.

[26] The learned deputy in reliance on the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 FC, submit that it was incumbent for the 2nd accused to explain his act of running away when he was made known by SP4 that SP4 was a police officer by showing his authority card to both the accused.

[27] On the 2nd element that is the type and weight of the drugs, the learned prosecution submit that SP2 who conducted the analysis of the drugs in exh. P10 and exh. P11 respectively confirmed that that exh. P10 contained net weight of 456g of methamphetamine and exh. P11 contained net weight of 439g of

methamphetamine which gave a total net weight of 895g of methamphetamine. The learned deputy submit that the evidence of SP2 was sufficient and was corroborated by the chemist report exh. P7.

[28] As regard the evidence of common intention pursuant to s. 34 of the Penal Code, there were sufficient direct evidence by SP4 and SP5 respectively to show that the 1st accused had gone to see the 2nd accused, had a conversation and then handed over the brown paper bag exh. P8 to the 1st accused. That in itself was self-evident that both the accused had the common intention to trafficking in drugs namely 895g of methamphetamine. The learned deputy had quoted a passage from the case of *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 which states *inter alia* that 'a pre-concert or pre-planning may develop on the spot or during the course of the commission of the offence, but the crucial test is that such plan must precede the act constituting the offence. The existence of common intention is a question of fact and in each case it may be proved as a matter of inference from the circumstances of the case.'

Decision At The Close Of The Prosecution's Case

[29] Under s. 180(1) of the Criminal Procedure Code (hereinafter called 'the CPC') when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused. The case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC, has provided guidelines what the court is to take at the close of prosecution's case which is summarized as follows:

(i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all the reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused.

(ii) ask yourself the question, If I now called upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to the question is 'Yes', then a *prima facie* case

has been made out and the defence should be called. If the answer is 'No' then, a *prima facie* case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 1 LNS 82.

[30] The prosecution in order to prove a *prima facie* case against the accused person must prove that:

(i) the accused had custody and control of the drugs;

(ii) the accused had knowledge of the drugs seized;

(iii) the was trafficking in dangerous drugs.

[31] To implicate the accused with a charge of trafficking in dangerous drugs, the prosecution must prove that what the accused did in this case come within the meaning of trafficking as defined in s. 2 of the DDA 1952 which defines trafficking as follows:

> Unless the context otherwise requires, trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, keeping, concealing, buying, selling, giving, receiving, storing, administrating, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

[32] The court has no qualms with the authorities cited by the learned counsel with regard to the definition of 'trafficking' under s. 2 of the DDA 1952, in his written submission in reference to three cases as follows: *PP v. Chia Leong Foo* [2000] 4 CLJ 649 HC where *inter alia* it states that

> most of the acts that constitute trafficking as defined in s. 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession ... It follows that a person cannot keep, conceal, store, transport, or carry dangerous drugs within the meaning of trafficking in the Act without being in the possession of them.

[33] In *PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480 HC, the court held *inter alia*

> I agree with learned counsel that the acts that constitute trafficking as enumerated in s. 2 of the Act refer to some overt act that goes beyond mere passive possession … Thus in order for any act to come within the definition in s. 2 of the Act it must be limited to the context of the scope of the acts enumerated in the definition section, that is to say, it must relate to an overt act which goes beyond passive possession.

[34] Lord Diplock in *Ong Ah Chuan v. PP* [1980] 1 LNS 181, a decision of the Privy Council in discussing the definition of 'trafficking' under the Misuse of Drugs Act 1973 of Singapore and quote *in extenso* the relevant passage as follows:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking, under s. 3 involves something more than passive possession or self administration of the drug; it involves doing or offering to do an overt act of one or the other of the kinds specified in para. (a) of the definition of 'traffic' and 'trafficking' in s. 2. Even apart from the statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties; a supplier and a person to whom the goods are to be supplied. This concept involving transfer of possession is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking' transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport,' although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of drugs by him after their transport. It must mean moving the drugs from one place to another, it may mean moving them also to another person but it need to do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. It their lordships' view the immediate context of the verb "transport" to which attention has been drawn, attracts the maxim *noscitur a sociis*. This, and the fact that it appears in the definition of the verb to "traffic" of which the natural meaning in the

> context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that "transport" is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which is three with its draconian penalties is directed.
>
> … This is a very *wide* description of acts that may be treated as equivalent to the substantive offence of trafficking, nevertheless, in their lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that *mere* possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss. 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person, and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or distributor or another dealer.

[35] The offending drugs in this case were found in the brown paper bag with the words 'Louis Vuitton' written on it and tendered as exh. P8 which was carried by the 2nd accused and handed over to the 1st accused in front of a store selling 'Girls' branded clothes. This act of the 2nd accused handing over the brown paper bag was witnesses by SP4 and SP5 who were already in position to apprehend both the accused once the transaction of handing over was concluded. True enough once exh. P8 exchanged hands, immediately both of them were pounced by SP4 who introduced himself as a police officer by showing his authority card. The 2nd accused unexpectedly 'took to his heels' and attempted to escape but was subsequently arrested after a brief scuffle by SP5 in the storeroom of a store called 'Royal Sporting House'.

[36] The court was of the view that going by what were said in the three cited cases of *Chia Leong Foo(supra)*, *Hairul Din bin Zainal Abidin (supra)* and *Ong Ah Chuan (supra)* that there must be an overt act on the part of the accused which went beyond mere passive possession, then the facts of the instant case clearly evidenced the act of running away from crime scene went beyond mere passive possession by the 2nd accused. Not only that, there was definitely a clear transfer possession of the drugs from the 2nd accused to the 1st accused. Once it was proven that the prerequisite element of possession had been established, then the act as envisaged in s. 2 of the DDA 1952, such as carrying dangerous drugs to wit methamphetamine constitutes trafficking. In this instant both the accused were in possession and found to be carrying dangerous drugs within the meaning of trafficking in the Act. Based on the above facts, the court finds that the 1st and 2nd accused had custody, control and possession of the brown paper bag and the drugs contained therein. The evidence of SP4 and SP5 respectively clearly established that the brown paper bag exh. P8 which contained the drugs was been carried by the 1st accused and to be transferred to the 2nd accused. Hence both the accused had physical custody and control of the incriminating drugs and were caught red handed by SP4 and SP5 respectively.

[37] Even without the aid of the presumptions in s. 37(da) of the DDA 1952, there were ample evidence to show that not only did 1st accused and 2nd accused have physical custody, control and possession of the brown paper bag containing the drugs, both equally have knowledge by virtue of the overt act of the 2nd accused running away after been introduced by SP4 as a police officer. The accused must have known the contents in the brown paper bag at the time of their arrest as the brown paper bag was not sealed or covered and it did not require much effort to uncover the contents in exh. P8 were drugs. Hence it could not be farfetched for the court to infer that both the accused had all the time to see and ascertain the contents of exh. P8 were drugs. To my mind the cumulative conduct of the 2nd accused carrying the brown paper bag and the attempt to escape and the condition of the brown paper bag not being sealed, covered and easily opened led to the irresistible of knowledge. Hence the prosecution has established a strong *prima facie* case of actual possession.

[38] In *Parlan Dadeh v. PP* [2009] 1 CLJ 717, the court held that the reaction of the appellant in looking stunned or shocked upon being approached by the police was clearly admissible under s. 8 of the Evidence Act since it had a direct bearing on the fact in issue as the drugs found were tucked away in front of the jeans worn by him. The explanation for his reaction must be offered by the appellant himself as required by s. 9 of the Evidence Act. In the instant case both the accused must explained why the 1st accused 'took to his heels' when approached by SP4.

[39] Upon inspection the contents of the brown paper bag marked as exh. P8, SP4 found that there was a white plastic bag with the words written 'Win One Million US Dollars' marked as exh. P9. Inside exh. P9 were two transparent packets containing whitish powdery substance suspected to be syabu. On the 1st transparent packet marked as A2, signature and dated 19 October 2009 and similarly on the other transparent packet marked as 'A3', signature and dated 19 October 2009 respectively.

A Break In The Chain Of Exhibits

[40] The court was unable to accept the view of the learned counsel that there has been a break in the chain of exhibits. Although SP4 did not state what he did to the exhibits from the time they were seized until the time he handed them to SP6 at about 4am in the morning 20 October 2009, nevertheless he had put his markings on the exhibits namely on the brown paper bag he had marked 'A' which was tendered as exh. P8. The contents of 'A' was a white plastic bag with the words 'Win One Million US Dollars' which was marked as 'A1' and later marked as exh. P9. Inside the white plastic bag marked 'A1' (exh. P9) were two transparent plastic packages marked as 'A2' and later marked as exh. P10 and the other transparent plastic package marked as 'A3' and later marked as exh. P11 respectively. All the exhibits marked also bored the signatures of SP4 and a date was written on all the exhibits to further identify the exhibits and remained intact.

[41] Having marked the exhibits accordingly, SP4 then handed over the exhibits to SP6 on 20 October 2010 and a handing over form (Borang akuan penerimaan) was prepared by SP4 and later tendered as exh. P17. It was the contention of the learned defence counsel that the particulars in exh. P17 was incorrect as

A the two transparent plastic packages were marked as 'A3' and 'A4' respectively. SP6 when testifying in court explained that the description in exh. P17 written by SP4 in relation to 'A4' was a mistake because SP6 received two transparent plastic packages marked as 'A2' and 'A3' respectively. There was no package
B marked 'A4' received by SP6 although the description in exh. P17 mentioned one of the packages was marked as 'A4'. Furthermore in the evidence by the chemist, SP2 stated that when she inspected the content of the box marked 'K' she confirmed that the two transparent plastic packages were marked as 'A2' and
C 'A3' respectively. Therefore there was no transparent plastic package marked 'A4' as written in exh. P17. The court accepted the explanation of SP6 and that of the chemist SP2 that the marking written in exh. P17 was a clear mistake and as far as the instant case is concerned that there were only two transparent
D plastic packages involved marked as 'A2' and 'A3' respectively. The court concludes that it was satisfied that the drugs seized from the brown paper bag exh. P8 marked as exhs. P10 and P11 were the same drugs seized from the 1st accused and analysed and tendered in court.

E

The Difference In The Gross Weight Of Methamphetamine

[42] In respect of the difference in the gross weight of the methamphetamine in the two packages exhs. 'A2' and 'A3'
F respectively as weighed by SP4 was 1570g and the gross weight by the chemist was 1270.05g. The case of *Yusri bin Pialmi (supra)* can be distinguished from the facts of the instant case in that in *Yusri*'s case there has been an increase in the weight of the cannabis by 10.21g whereas in the instant case it was the
G opposite ie, when the chemist weighed the methamphetamine its gross weight was 1270.05g. In the instant case SP4 who weighed the drugs to get the gross weight had explained that he would not know whether the digital weighing machine he used had been calibrated or not. All SP4 could say was that before he used the
H digital weighing machine he ensure that the figure would show zero. Unlike the weighing machine used by SP2 at the chemistry department, has always been calibrated periodically to ensure accuracy. It would be logical to assume that a weighing machine which has been calibrated would be very accurate as compared to
I the one which had not been calibrated. Query? Why was it more onerous for SP4 if the drugs he weighed would differ in gross

weight with the gross weight by the chemist. Would it be better for SP4 not to weigh the drugs seized and just do the markings on it and let the chemist at the chemistry department weighed it. The court would have thought that getting the gross weight by the police was purely administrative in order to determine a tentative charge against an accused before the net weight was obtained and it should not affect the prosecution case. In any event under the Weights and Measures Act 1972, there was not requirement for the weighing machines used in government department to be calibrated. Calibration was only application to the weighing machines use for trade.

[43] In the instant case the court was of the view that the movements of the drugs were properly explained by the prosecution's witness especially SP4 as to what he did with the drugs. From the time the drugs were seized at 3.50pm and until he handed over to SP6 at 4am in the morning the following day. SP4 did not say that he gave it to any other person other than SP6. What it means is that all along the drugs seized were in his custody. The defence also did not suggest to SP4 that during that period the drugs were not in his custody and safe keeping. The court would rely on the case of *Loh Kah Loon v. PP* [2011] 5 CLJ 345 which states *inter alia* that 'on the facts of the case, the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence.

[44] In the case before the court after the explanation by SP6 as to how one of the packages came to be written in exh. P17 by SP4, the doubt vanished and the identity of the drugs remained intact. The court further held that the drugs seized from accused by SP4 were duly marked, and handed over to SP6 who in turn sent them to the chemistry department for analysis. The exhibits were reproduced and tendered in court as exhs. P10 and P11 respectively were found to be the same drugs tendered as evidence. I have no doubt that exhs. P10 and P11 tendered were the same exhibits seized.

A **The Non-Tendering Of The CCTV Recordings**

[45] The non-tendering of the CCTV showing the footage of what really transpired would not affect the prosecution case but as the defence alleged if tendered it would show the innocence of both accused. As far as the prosecution case was concerned, they were not relying on the recordings of the CCTV to strengthen their case but on other evidence of material witnesses for the prosecution such as SP4 and SP5 respectively. The court would be slow to invoke the provision of s. 114(g) of the Evidence Act 1950, and to draw adverse inference for failure to tender it.

[46] In conclusion, the court made a finding that the overwhelming evidence of direct physical possession of the drugs by both the accused, would invoke the presumption under s. 37(da)(xvi) of the DDA 1952, in view of the fact that the net weight far exceeded the minimum threshold net weight for trafficking, it could not possibly meant for own use but for trafficking.

[47] In the light of the principles set out in the authorities referred to and reproduced above, the court was satisfied that on the totality of the evidence before the court, the prosecution had succeeded in proving a *prima facie* case and called upon the 1st and 2nd accused to enter their defence as per the original charge and after explaining the three options available, both accused elected to give evidence from the witness box.

Defence Case

Tay Chung Chow – 1st Accused (Hereinafter Called 'SD1')

[48] SD1 went to the Midvalley Megamall because he wanted to change Malaysian Ringgit into Yuan for the sum of RM10,000 from a moneychanger who was known to Steven (later SD3). Steven then drove the car to Midvalley Megamall to meet his friend the money changer. While SD1 was waiting in between the shop selling 'Girls' branded goods and the Adidas shop he gave the cash money of RM10,000 to SD3. SD1 then saw two foreigners coming towards him and SD3. Their physical appearance was that one was big size and the other was small built. The big size man who was the 2nd accused walked away towards the Adidas store whereas the small built man walked towards SD1 carrying a brown paper bag exh. P8. Before SD1

was arrested by the police, the small size man then threw the brown paper bag near where SD1 was standing and ran away and it landed at the place where SD1 was standing. SD1 said he and SD3 did not carry any brown paper bag exh. P8. SD1 said when the police open the brown paper bag and asked him whether he knew the contents in the brown paper bag to which SD1 replied that he does not know. The police then told him that the contents were drugs. From the Midvalley Megamall SD1 was taken to his house at Kuchai Lama and thereafter SD1 was remanded in the lockup.

[49] During cross-examination, SD1 disagreed that he did not see two foreigners coming towards him. SD1 denied that he received a brown paper bag exh. P8 from SD2 where the contents were two (2) transparent plastic packages marked as exhs. P10 and P11 containing the drugs respectively.

[50] In re-examination, SD1 was shown a photo-fit from a passport of a man named Peyman Soleymenpour which referred to a small size body built man who he had earlier mentioned in his testimony. SD1 could identify the small size body built man because he was remanded together in the lockup.

Habib Shayan Saadi – 2nd Accused (Hereinafter Called 'SD2').

[51] On 19 October 2009, he was arrested at the Midvalley Megamall Shopping Complex and further state that prior to his arrest he knew of a person by the name of Peyman Bahrom Soleyman Pour, an Iranian. A copy of the front page of a passport of Peyman Bahram Soleyman Pour was tendered as IDD20. Payman Bahram Soleyman Pour had an office at the second floor of the Mall and also in Johor Bharu. On the day of the incident SD2 said he went to see Peyman Soleyman Pour and was told that Peyman wanted to see one of SD2's friends in Midvalley. I was free on that day so he followed Peyman. SD2 went to Midvalley in Peyman's Honda CRV. After parking the Honda CRV at the parking lot, SD2 and Peyman went inside the shopping complex. While SD2 and Peyman were having a drink, Peyman received a call and SD2 was told that Peymen wanted to see his friends, Peyman then told SD2 to go window shopping until he is back. SD2 went in front of the Adidas shop and while he was window shopping, people whom he did not know came

A and arrested him. SD2 was not carrying anything but Peyman was carrying a paper bag. SD2 was taken to an area where another person who was arrested earlier. SD2 told the police about Peymen's description, his height, clothes he was wearing and the particulars of the vehicle he was driving including the registration B number. The police then showed him the brown paper bag which he saw in Peyman's hand earlier. SD2 told the police that the brown paper bag exh. P8 belonged to Peyman. SD2 was taken to his condominium and later to Bestari Condominium where Peyman was there too and the police found drugs. Peyman and C SD2 were charged for trafficking at the Kuala Lumpur High Court for the drugs found in the condominium and were acquitted and discharged. Peyman is now in Iran.

[52] In cross-examination, SD2 said while visiting Malaysia he had D plans to go to Australia. He knew Peyman for more than four or five years in Iran. SD2 disagreed that Peyman was not carrying the brown paper bag exh. P8. He disagreed that at the place marked X was the place when he met the SD1 and handed over the brown paper bag exh. P8. He also disagreed that after E handing over the brown paper bag he ran away towards the storeroom of the Royal Sporting House. SD2 does not know whether Peyman was arrested on the same day as he was arrested. SD2 denied that he knew the contents in the brown paper bag exh. P8. SD2 said that he was with Peyman for about F 11/2 hours prior to his arrest. He then saw Peyman at a lockup at the IPKKL.

[53] In re-examination, SD2 said from the car park until he was arrested, he was with Peyman for about 15-20 minutes,

G *SD3 – Seet Chee Yong*

[54] He knew the SD1 whom he called 'Pai Kuat' and SD3 was called 'Steven' by SD1. When SD1 was arrested Steven was there. Steven came to know SD1 six months prior to the arrest. H SD1 asked Steven whether he knew of any money changer who could give better rate. He told SD1 of his friend by the name of Peyman who had an office at the 2nd floor at the Mall. SD1 then gave Steven RM10,000 in cash. At about 2pm in the afternoon, Steven drove his car to bring SD1 from his house at Kuchai Lama I to the Midvalley Megamall. Upon arrival at the Midvalley

Megamall, Steven parked his car at the Boulevard Hotel and then made a call to Peyman to inform him that he had arrived. Peymen told Steven that he was at the Macdonald and asked SD1 and SD3 to wait quite near to the Adidas shop and he will come up to meet SD1 and Steven. SD3 then saw Peyman came up the escalator. SD3 then saw someone beside Peyman but was not sure whether he was Peyman's friend. SD3 then went on to descript the physical features of the man beside Peyman whom he recognized as the 2nd accused (SD2) sitting in the dock and did not carry anything. When Peyman and the other person were at the ground floor they then walked in opposite direction. SD3 did not see the brown paper bag as he did not focus on the bag. SD3 saw Peyman and SD1 being arrested but was not sure how both of them came to be arrested. At the material time Peyman and SD1 were arrested, SD3 was a distance away. SD3 saw several Malay men surrounding Peyman and SD1. SD3 then left the scene and did not know what happened thereafter.

[55] In cross-examination, SD3 said he received money from SD1 at a Restaurant Tim Shin Too Lai. SD3 said the people who surrounded Peyman and SD1 made quite a big circle. SD3 denied that he gave evidence to assist SD1 and SD2 in the instant case.

SD4 – Sanah binti Rasa – Secretary To Justice Dato' Ghazali Cha

[56] This witness was called to tender the notes of proceeding with regard to the Criminal Trial No: 45-22–2010 before the Kuala Lumpur High Court presided over by Justice Dato' Ghazali Cha involving Peyman Bahram Soleymanpour as the 1st accused and Habib Shayan Saadi as the 2nd accused and marked as exh. D21. The relevant pages referred to are pp. 78-112 the evidence ASP Zainal Abidin and pp. 113-127 the evidence of Inspector Gan Chee Liang.

Submission At The Close Of Defence Case

Defence Submission

[57] The following issues were raised by the learned defence counsel in his submission:

(a) The Existence Of Peyman Soleymanpour

[58] The existence of Peyman Soleymanpour has been proven by the defence beyond reasonable doubt. The prosecution did not challenge the existence of Peyman Soleymanpour. There was evidence that Peyman Soleymanpour was arrested by Insp Gan Chee Liang soon after the arrest of SD1 (1st accused) and SD2. Peyman Soleymanpour was seen driving out of the car park at the Midvalley Megamall. This piece of evidence corroborated SD2's evidence that he went to Midvalley Megamall with Peyman Soleymanpour who drove a Honda CRV 9364. The arrest of Peyman Soleymanpour also corroborated SD2's evidence that he told the police that the paper bag containing the drugs belonged to Peyman Soleymanpour and he told the police about Peyman Soleymanpour's car and where the said car was parked. Inspector Gan's evidence that she recovered keys from Peyman Sleymanpour's pocket which was later used to open an apartment where the drugs was recovered, was also consistent with the fact that the drugs in the brown paper bag belonged to Peyman Soleymanpour who was seen carrying the said paper bag by SD1, SD2 and SD3. All their testimonies were consistent with the suggestion made by the defence during the prosecution's case and cannot be said to be of marginal value. The said suggestion crystallised into evidence when SD1, SD2 and SD3 gave evidence and corroborated each other and also the evidence of Inspector Gan Chee Liang given at the trial of MTKL Criminal Trial No: 45-22-2010. According to the evidence given by Inspector Gan was that based on information received, she drove around Midvalley Megamaal to trace a car which was a Honda CRV No: 9364 driven by an Iranian and later arrested the driver of the said vehicle whose name was Peyman Soleymanpour. The learned counsel was still relying on the fact that the non tendering of the recordings of the CCTV by the prosecution was fatal to the prosecution's case and cited the case of *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597, where the court held that failure on the part of the prosecution to tender an non-incriminating exhibit is consistent with the innocence of the accused is fatal. The existence and the arrest of Peyman Soleymanpour soon after the arrest of SD1 and SD2 has clearly raised a reasonable doubt that SD1 and SD2 has control and control of the paper bag that contained the drugs.

(b) The Break In The Chain Of Exhibits Has Created Doubt As To The Identity Of The Exhibits

[59] After the arrest, no evidence was led as to who has continuous custody and control of the incriminating exhibits from Midvalley Megamall to the 1st accused to SD1's house then to IPD Brickfields and thereafter to IPK Kuala Lumpur and eventually to SD2's apartment and Peyman Soleymanpour's apartment and then back to IPK KL. No evidence was led as to where the exhibits were kept for a period of 12 hours before they were handed over to SP6.

(c) No Evidence Of Custody, Control And Knowledge

[60] There were no evidence as to where P8 was seized from. Although the witnesses denied that exh. P8 was seized from the floor they did not testify that exh. P8 was seized from the hands of SD1. On the contrary there was evidence that SD2 was not carrying anything in his hands before and after the arrest and that Peyman Soleymanpour was seen carrying the paper bag in his hands moments before SD1 (1st accused) was arrested. The arrest of Peyman Soleymanpour was consistent with SD2's evidence that he told the police that the paper bag belonged to Peyman Soleymanpour and the description of Peyman and which led to his arrest soon after that. Nothing incriminating was found on the body of SD2 (2nd accused). There were also no evidence of any fingerprints or DNA profiling of either the accused were found on exhs. P8, P9, P10 and P11 respectively. The best evidence and the most independent evidence are the CCTV recordings which were not produced.

Whether The Evidence Irresistibly Points Towards The Guilt Of Both Accused Where The Evidence Is Based On Circumstantial Evidence?

[61] The evidence against both the accused was purely circumstantial. The burden of proof on the prosecution in any case base on circumstantial evidence is a heavy one. The prosecution must prove that there is one and only one conclusion irresistibly pointing towards the accused and no one else.

A **Prosecution Submission**

[62] The learned deputy in his submission said that the defence of both the accused was *mere* denial and failed to rebut the presumption of trafficking and also failed to cast any reasonable
B doubt on the prosecution's case. The crux of the defence case was that both admitted to being arrested at the ground floor of Midvalley Megamall. That SD1 denied that the SD2 had handed over the brown paper bag exh. P8 where upon he was arrested. SD2 denied that he had fled the scene and hid in the storeroom
C of one of the shop namely the 'Royal Sporting House' where he was arrested by SP5. The learned deputy cited the case of *Mamasobri Useng v. PP* [2010] 8 CLJ 949, where the court held *inter alia* that 'the defence has nothing, but bare denials. Such denials, in the face of the strong and overwhelming evidence did
D not raise any reasonable doubt on the prosecution's case.' Similarly in *PP v. Ling Tee Huah* [1980] 1 LNS 212, the court held that a denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient.

E **[63]** From the evidence of SP4 and SP5 respectively, both accused had physical custody and control of exh. P8 and the contents namely the drugs in exhs. P10 and P11 respectively and both knew the nature of the contents of the packages being prohibited drugs.

F **[64]** The learned deputy further submit that the evidence of the existence of Peyman was an afterthought as it was never put to the prosecution's witnesses SP4 and SP5 respectively that the brown paper bag exh. P8 belonged to Peyman and Peyman was said to be with SD2 at the Midvalley Megamall to meet SD3 and
G SD1 respectively. Peymen Soleymanpour's named was only repeatedly mentioned during the defence case. Had Peyman was present at the Midvalley Megamall at the material time when the police arrested SD1 and SD2, he too would have been arrested together with SD1 and SD2 respectively.

H **[65]** The learned deputy further argued that the defence had failed to cast any reasonable doubt on the prosecution case and the prosecution had established its case against both accused beyond reasonable doubt and urged the court find both accused
I guilty as charged.

Decision At The Close Of Defence Case

[66] The law at the close of defence case is well established in the case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, where Mohammed Azmi SCJ held as follows:

> It is a well established principle on Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden place on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to case a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution case, prosecution may of course rely on available presumption to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt ... if defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

[67] Section 182A(1) of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

Maximum Evaluation Of The Evidence

[68] It is an accepted principle of law that the defence evidence need to be weighed with the rest of the evidence presented by the prosecution by referring to the principles stated in the case of *Mohamad Radhi Yaakob (supra)*. In this respect the duty of the defence is to cast a reasonable doubt in the prosecution's case. In evaluating the defence's case, SD1 and SD2 had only denied the version's as presented by the prosecution's witnesses in particular SP4 and SP5 respectively. The versions of event given by both SD1 and SD2 was diametrically opposite to that given by SP4 and SP5. Having analysed the evidence of the prosecution and that of the defence, the court made a positive finding of

actual possession of the proscribed drugs found in P8 and the contents therein in exhs. P10, and P11 respectively by SD1 and SD2 respectively. The court was also satisfied that the prosecution had successfully established possession pursuant to s. 37(da)(xvi) of the DDA 1952.

[69] In so far as what amounted to 'possession' it would be useful to quote the Federal Court case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, which held as follows:

> The possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of *mens rea*. Without *mens rea* possession cannot be criminal except in certain cases created by statute, which is not applicable in this case' *Saad Ibrahim v. PP* [1968] 1 MLJ 158 per Yong J.

[70] In coming to the conclusion that both the accused had the *mens rea* possession, I have analysed the surrounding circumstances of the case which related to the demeanour of both the SD1 and the SD2 when arrested by SP4 and SP5 respectively. In so far as SD1 was concerned immediately after SD2 handed over exh. P8 to him and SP4 had introduced himself as a police officer, SD1 was arrested but SD2 fled the scene. After a short chase SD2 was arrested by SP5.

[71] It is the finding of the court that the cumulative force of the facts adduced by the prosecution had convinced me that both the accused had *mens rea* possession and that the case came within the s. 37(da)(xvi) of DDA 1952, so that both accused were presumed to be traffickers of the drugs in question. Once the conditions stated in the section are met, the presumption of trafficking is triggered without the prosecution having to prove the overt acts mentioned in s. 2 of DDA 1952. In the instant case there was sufficient evidence to trigger the presumption in s. 37(da)(xvi) of the DDA 1952 as there was sufficient cogent evidence to prove that SD1 and SD2 were in possession of the drugs. Evidence was led that when SD1 was apprehended he was in possession of the brown paper bag marked exh. P8 and the contents therein, the prohibited drugs. SD2 was described as attempting to escape apprehension by hiding in the storeroom of the shop named 'Royal Sporting House'. There was sufficient

evidence to infer that both SD1 and SD2 knew that the brown paper bag contained prohibited drugs as SD2 had taken flight when SP4 identified himself as a police officer.

[72] The court cannot accept the defence evidence as they were *mere* denial without any proof. The court accepted the evidence of the prosecution witnesses with great respect. There was no inkling that both the accused were framed up for an offence which they have not committed. The evidence of knowledge could easily be drawn from the inferences of their attempt to escape arrest. Their overt act in doing so clearly demonstrated the proof of knowledge by inferences.

[73] In *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597, the court held that 'it should be borne in mind that proof of intention or knowledge is generally inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. The difficulty had been acknowledged in the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237 when Thomson J said this (at p. 239):

> Intention is a matter of fact in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each case.

[74] In the recent judgment of Federal Court in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, Ariffin Zakaria FCJ (as his lordship then was) in dealing with the manner of proving knowledge said succinctly at pp. 351-353 and the court will adopt the relevant passages referred to by His Lordship in its entirety to the instant case. The court on the facts found that there was sufficient evidence to find both the SD1 and SD2 to be in custody and control of the brown paper bag containing the drugs therein namely exhs. P10 and P11 respectively. Relying on the presumption under s. 37(d) of the DDA 1952, also held that both accused were in possession of the drugs. Based on the authorities referred to earlier, the irresistible inference that may be drawn in the circumstances was that the SD1 and SD2 all along knew about the drugs found in the brown paper bag (exh. P8)

[75] The reaction or overt act of both accused was sufficient to draw inferences *mens rea* possession. Evidence of conduct is admissible under s. 8 of the Evidence Act 1950, which states as follows:

> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding is relevant if the conduct influence or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Illustration (i) to s. 8 reads as follows:
>
> A is accused of a crime.
>
> The facts that after the commission of the alleged crime, he absconded or was in possession of property or proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

[76] The evidence of conduct admissible under s. 8 may be explained as provided in s. 9 of the Evidence Act 1950 which reads as follows:

> Facts necessary to explain or introduce a fact in issue or relevant fact or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant or fix the time or place at which any fact in issue or relevant of parties by whom any such fact was transacted are relevant so far as they are necessary for that purpose.

[77] It is pertinent to note that in the instant case, it was the prosecution's case that the SD2 attempted to escape arrest after they were ambushed. However SD2 had totally denied that he tried to run away to escape arrest. As the court had earlier accepted the evidence of the prosecution in particular SP4 and SP5 respectively that SD2 attempted escape from arrest amounted to an overt act and not just mere passive act.

[78] In *DPP v. Brooks* [1974] 2 All ER 840, where the brief facts are as follows namely, the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him because there were evidence to show that the drugs were in the physical custody and control of the accused.

[79] Likewise in the instant case the conduct of SD2 in attempting to escape arrest was because there were evidence to show that the drugs in exh. P8 were in their physical custody and control.

[80] The court also found that both the accused had carried the proscribed drugs and the quantity of the drugs seized were far in excess of that they would require for their personal use, if any. The strong irresistible inference was that the drugs were conveyed and transported for the purpose of trafficking in it as defined by s. 2 of the DDA 1952. The court rejected both the defence version as to how they came to be at the same place and at the same time in the afternoon of the incident.

[81] The court will deal with the issues raised by learned defence counsel at the close of the defence case:

Whether Peyman Soleymanpour Was At The Scene Of The Crime And The Brown Paper Bag exh. P8 And Its Contents Belonged To Him

[82] It was the defence case that Peyman was present at the Midvalley Megamall to meet Steven (SD3). Steven had told him that SD1 wanted to change RM 10,000 into Chinese yuan as SD1 wanted to visit China. Peyman was described by SD3 as having a business as a money changer and having an office at the 2nd floor at the Megamall. As for SD2 he knew Peyman prior to his arrest as a fellow Iranian and on the day of the incident had followed Peyman to Midvalley Megamall in a Honda CRV. The scenario was that Steven knew Peyman but did not know SD2. SD2 knew Peyman but did not know SD1 and Steven (SD3). SD1 knew Steven (SD3) but did not know SD2 and Peyman. It was the evidence of the SD1, SD2 and SD3 that Peyman was present at the Midvalley on the afternoon of the incident carrying the brown paper bag exh. P8. After a few phone calls between

Steven (SD3) and Peyman, it was agreed that Peyman would come up the escalator from where he and SD2 had a drink at the Macdonald restaurant. It was the defence version that both SD2 and Peyman together they went up the escalator to the ground floor of Midvalley Megamall. According to SD2, Peyman had told him that he would be meeting his friends and had told SD2 to go window shopping and to come back after he had finished meeting his friends. Peyman did not tell SD2 who his friends were. According to SD3, Peyman had asked him and SD1 to wait near the Adidas store on the ground floor. SD3 saw Peyman and SD2 came up the escalator and upon reaching the ground floor, SD2 walked away towards the right while Peyman walked towards the left. Peyman was seen carrying a brown paper bag and SD2 did not carry anything. According to SD3 as Peyman was walking towards SD1 and the police laid ambush and arrested him and SD1. SD3 was at the material time at a distance by reference to where he was in the witness box to the left corner of the court room as demonstrated by him. SD3 further said when the police arrived to arrest Peyman, Peyman did not have with him the brown paper bag. SD3 conveniently said he did not know where the brown paper bag was. According to SD1 it was Peyman who threw the brown paper bag minutes before the police laid ambush and it landed near where SD1 was standing. As for the SD2 when the arrest incident happened he did not run away from the scene contrary to what SP4 and SP5 had said. If SD2 did not attempt to run away to evade arrest then presumably he must be nearby when SD1 was arrested. It was the defence case that the drugs found in the brown paper bag namely exhs. P10 and P11 respectively belonged to Peyman and not SD1 and SD2.

[83] It is the defence submission that Peyman was arrested on the same day as SD1 and SD2 were arrested. This was evinced by the fact that after SD2 was arrested he had divulged valuable information about the whereabouts of Peyman, his physical description, the address, and the car he was driving. Acting on these information supplied by SD2, Paymen was arrested and SD2 was taken to SD2's condominium and of that Peyman's condominium where upon searching Peyman's condominium, the police found drugs for which SD2 and Peyman were charged for trafficking of drugs before the Kuala Lumpur High Court *vide* Criminal Trial No: 45-22-10. Both SD2 and Peyman were acquitted and discharged by the court.

[84] Before the court analysed the evidence relating to the above issue about Peyman Soleymanpour, whether he was present at Midvalley Megamall at the same time SD1 and SD2 were arrested, it would be prudent to look at the submission of the prosecution on this issue. The learned deputy had submitted that the defence version that the brown paper bag exh. P8 containing two packages containing drugs belonged to Peyman Soleymanpour and it was thrown away by him and landed near where SD1 was standing, was not put forward during cross-examination especially to SP4 and SP5 respectively. The court has perused the notes of evidence and found that what the learned deputy had submitted was correct. The court found that the defence did not put across to the prosecution witnesses in particular SP4 and SP5 the version as mentioned in the evidence of SD1, SD2 and SD3 respectively. It is trite law that failure to put across the defence case during the prosecution case could be fatal to the defence. In *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, the Federal Court held *inter alia* as follows:

> Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve' so to speak and it being branded as a recent invention.

[85] Similarly in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, the Federal Court also held *inter alia*:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true, and thus *avoid* the adverse comment, that the defence is a recent invention – in other words, 'kept up it sleeve' as it were and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence.

[86] On the strength of the two cited case that the failure by the defence to put its version of its case to the key prosecution witnesses namely SP4 and SP5 respectively that the brown paper bag exhibit belonged to Peyman had dampened the defence case and is fatal. Why kept that version until SD1, SD2 and SD3 gave evidence.

[87] For the sake of completeness, the court analysed the defence version that Peyman was present at the Midvalley Megamall and the brown paper bag containing the drugs namely exhs. P10 and P11 respectively was thrown away by him and it landed near where SD1 was standing, thus the arrest of SD1 by SP4. It was the testimony of SD3 that he saw Peyman and SD1 being surrounded by a group of Malay men from the position SD3 had descript earlier. If that version was correct in that Peyman was at the scene of the crime together with SD1, and arrested together, how come Peyman was not charged together with SD1 and SD2 in the instant case before this court. Could he have escaped the 'drag net' when he and SD1 were surrounded by the police team where SD1 was arrested but Peyman escaped. The evidence of SP4 and SP5 did not at any time mention that there was another person arrested at 3.50pm in the afternoon 19 October 2009 at the Midvalley Megamall. The facts in the case No: 45-22-2010 revealed that SP9 ASP Zainal Abidin bin Saad a witness in the said case testified that on 19 October 2009 he received a call from Inspector Iqbal who was a witness SP4 in the present case informing that two suspects were arrested, one Chinese and an Iranian and had asked him to conduct a search at the home of one of the suspect. From the notes of evidence of case No: 45-22-2010 it also revealed that on 19 October 2009 at about 5.05pm, SP10 Inspector Gan Chee Liang had arrested an Iranian at the junction of the traffic light Bangsar Shopping Centre, Jalan Maarof, Kuala Lumpur. At the time the Iranian suspect was arrested he was behind the wheels stopping at the traffic lights because it turned red. After the arrest, the suspect was taken to the suspect's condominium at No: 109-17-05, Bistari Condo Jalan 1/64 D Off Jalan Putra, Kuala Lumpur where the police found drugs namely Eramine five. The police also took the suspect to another condo namely at No 107-23-01 which was located at a different block. The suspect was Peyman.

[88] What probably happened was that after Peyman was arrested at the junction of the traffic light near Bangsar Shopping Centre, he was brought to where he was staying at Condominium Bistari and at the same time SD2 was also taken to his condo at Condominium Bistari. A search was done at the said condo and found that there were drugs and consequently for the drugs found at the condo, Peyman and SD2 were jointly charged for trafficking before the Kuala Lumpur High Court *vide* case No: 45-22-2010 and both were discharged and acquitted.

[89] As for the drugs found by the police at the Midvalley Megamall, where SD1 and SD2 were arrested, both were jointly charged in the present case before this court. There is no confusion on facts as to who was arrested where. The court would refer to the case of *Balamurugan Raja Gopal v. PP* [2011] 9 CLJ 477, where the *inter alia* the brief facts are that 'the appellant was detained following an information received of drugs related activity at a nearby hotel. When the appellant arrived at the hotel on a motorcycle he was alone at the material time. The appellant was wearing a crash helmet and there was another crash helmet that was placed between his thighs. He was apprehended whilst still sitting on the motorcycle. Upon a body search being done on the appellant did not find anything incriminating on him. However upon a search of the crash helmet that was placed between the thighs, the police found the offending drugs. When called to enter his defence, the defence version was that the drugs found in the crash helmet placed in between his thighs belonged to Ravi and that the crash helmet also belonged to Ravi. The learned trial judge after considering the evidence by the defence especially the appellant found that if Ravi had been there at the hotel it would not be possible for him to have escaped apprehension as there were 20 policemen waiting in ambush and on that basis the trial judge rejected the appellant's version that the drugs belonged to Ravi'.

[90] Likewise in the instant case if Peyman and SD1 had been surrounded by the police and SD1 was arrested as what SD3 had told the court, how was that Peyman was not caught together with SD1. That goes to show that at about 3.50pm in the afternoon when both SD1 and SD2 were arrested at the Midvalley Megamall, Peyman was not there. If Peyman was there at Midvalley Megamall he could not have escaped apprehension as he and SD1 were already surrounded by the police. In the notes of evidence tendered as exh. D21 it clearly showed that Peyman was elsewhere namely at the traffic light junction near Bangsar Shopping Centre at about 5.05pm in the afternoon. It would be highly improbable for Peymen to be at two (2) different places at the same time. The court hereby rejected the defence version that Peyman was at the crime scene when SD1 and SD2 were arrested and the brown paper bag exh. P8 and the contents therein exhs. P10 and P11 respectively was thrown away by Peyman and it landed near where SD1 was standing.

Absence Of Fingerprints Of The Accused On The Two Packages Containing Drugs

[91] The other issue which surfaced in the defence submission was the absence of any fingerprints and fingernail clippings for DNA profiling belonging to both the accused tendered by the prosecution which was fatal to the prosecution's case. The court disagreed with this view because it does not necessarily follow as a matter of course that the absence of the accused fingerprints or DNA profiling on the fingernail clippings was because no residue drugs were found on their fingernails it means that the accused were not connected with the drugs in question. Each case must be decided on its own facts. A fact in issue may be proved by more means than one. Accordingly the court held that the absence of the accused fingerprints or nail clippings to associate them with the drugs in question was of no consequence to the prosecution's case as there were other cogent evidence before the court to prove that SD1 and SD2 were in physical possession of the drugs exhs. P10 and P11 respectively. (see *Affis Ariffin v. PP* [2011] 7 CLJ 927).

[92] The court disagree with the view that in the instant case that the evidence tendered by the prosecution were merely circumstantial. The court was of the opinion that there was direct evidence in the form of eye-witnesses by the prosecution witnesses namely SP4 and SP5 who witnessed the whole episode and whom the court has no qualms about their credibility and as to the truthfulness as prosecution witnesses. Both have no hidden agenda by implicating SD1 and SD2 with the offence. They were just performing their job as police personnel.

[93] The court was of the view that the attempt by the defence to show that Peyman was at the scene of the crime at Midvalley Megamall on 19 October 2009 at 3.50pm and was carrying the brown paper bag exh. 8 had backfired. It did not create any reasonable doubt at all on the prosecution case but further marred the defence case.

[94] In conclusion, the court having carefully scrutinized the evidence by the prosecution and the defence in totality and subjecting it to a maximum evaluation, was satisfied that the prosecution had proven its case against the SD1 and SD2 as per charge beyond reasonable doubt in that both accused were held

be in physical possession, custody and control of the brown paper bag exh. P8 and the contents therein in exh. P10, and P11 respectively. That SD1 and SD2 also had knowledge of the drugs found in exh. P8. The court also invoked the presumption under s. 37(da)(xvi) of the DDA 1952, in view of the fact that the net weight of the drugs found was 895g which was in excess of the minimum of 50g for methamphetamine which could not possibly be for their own consumption but for trafficking. There was no break in the chain of exhibits seized and tendered in court .The court held that the defence had failed to cast any reasonable doubt on the prosecution's case and held that SD1 and SD2 guilty as charged and hereby sentenced both the accused to death by hanging.